No. 82-912.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

Brief on Behalf of the American Civil Liberties Union, as Amicus Curiae.

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Interest of Amicus ACLU.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. Foremost among those liberties are the freedoms of speech and of the press, and the ACLU has been active in this and other courts in defense of those freedoms against laws limiting the flow of information the First Amendment was enacted to secure.

The law at issue here substantially abridges First Amendment rights by withholding from the American people editorials which certain broadcasters wish to broadcast at private expense. More importantly, the theory relied on by the United States to support the prohibition would enable the government to infringe protected freedoms on the basis of acceptance of any government benefit, no matter how small. Because the law challenged here is such a direct infringement of and threat to constitutional rights, as the Ninth Circuit recognized and as the Department of Justice had previously understood, we submit this brief amicus curiae.*

Statement of the Case.

Appellees[1] initiated this lawsuit to protect their respective First Amendment rights to express and to receive the views of noncommercial broadcasters on issues of public interest and importance.

The District Court ruled that 47 U.S.C. sec. 399 directly violates these fundamental rights by banning speech clearly protected by the First Amendment. The Court concluded that this invasion of First Amendment freedoms is unsupported by any compelling governmental interest. This appeal ensued.

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[1] Appellees include the League of Women Voters of California, a non-profit, non-partisan organization whose purpose is to promote political responsibility through the informed and active participation of citizens in the democratic process; appellee Pacifica Foundation, a non-profit, non-governmental, educational corporation owning and operating noncommercial educational broadcasting stations in five major United States markets; appellee Henry Waxman is a United States Congressman who regularly listens to and views noncommercial radio and television broadcasts.

* Letters from the parties consenting to the filing of this brief are being lodged with the Clerk.

Summary of Argument.

In banning editorializing by broadcasters receiving grants from the Corporation for Public Broadcasting, 47 U.S.C. sec. 399 censors private speech. The provision does not merely decline governmental subsidy for broadcaster editorials; it actually forbids the use of nonfederal monies for such editorials once the broadcaster receives a federal grant. This incursion on First Amendment freedoms cannot be justified by the federal government's involvement in public broadcasting. If First Amendment freedoms can be bypassed by the simple assertion of such governmental presence, few First Amendment rights would survive in the modern environment of pervasive governmental interaction with the private sector. In effect, the government's theory sanctions censorship by the carrot rather than by the stick.

Although First Amendment limits on governmental regulation differ in the broadcasting context from other arenas, broadcast regulations still must satisfy the Constitutional requirements of weighty governmental interests and means carefully tailored to minimize the intrusion on protected freedoms. No such weighty governmental interests have been demonstrated to defend 47 U.S.C. sec. 399; asserted fears of undue governmental influence on broadcaster editorials and fears of partisan expression by broadcasters lack foundation. Moreover, considerably less intrusive measures are available to achieve the government's interests.

Argument.

I. Section 399 Unconstitutionally Imposes Governmental Censorship of Private Speech.

By banning broadcaster editorializing, Section 399(a) censors private speech. The provision does not merely decline

governmental subsidy for broadcaster editorials; it actually forbids the use of nonfederal monies for such editorials once the broadcaster receives a federal grant. This incursion on First Amendment freedoms cannot be justified by government involvement in the creation and shape of public broadcasting. If First Amendment freedoms can be bypassed on the basis of such governmental presence, few First Amendment rights, if any, would survive in the modern environment of pervasive governmental interaction with the private sector.

A. *Section 399 Censors Privately Financed, Private Speech.*

Public broadcasting in this country is neither federally owned nor federally operated, as it is in some countries. Instead, noncommercial, educational broadcasting stations are owned and operated by private nonprofit organizations, such as Appellee Pacifica Foundation; private colleges and universities; public colleges and universities; local school boards, and state and municipal broadcasting authorities. By forbidding editorializing by any noncommercial educational broadcaster receiving a federal grant from the Corporation for Public Broadcasting, Section 399 silences the views of private and nonfederal licensees, like the Pacifica Foundation, and precludes the use of private and nonfederal funds to produce and broadcast such editorial views. Section 399 does not simply place conditions on the use of federal funds; it uses the presence of federal funds to inject governmental control over the recipient broadcaster's ability to editorialize, using any other funds. Thus, Section 399 forces noncommercial broadcasters to forego non-federally financed editorial expression once their stations receive federal grants, no matter how small, for other purposes.

The editorial expression censored by Section 399 lies at the heart of First Amendment. As this Court has repeatedly de-

cleared, the First Amendment most centrally affirms the democratic commitment to free and open debate over public issues and policies. *NAACP* v. *Claiborn Hardware, Co.*, 102 S.Ct. 3409, 3423 (1982); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 735, 783 (1978); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964) ("central meaning of the First Amendment" is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"); *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) ("The first amendment affords the broadest protection to political expression"). Section 399 silences editorials — the expressed views of the editor. Congress has thus prevented public broadcasting stations from fulfilling their role as "private journalists," consistent with their trusteeship over the airwaves, *Columbia Broadcasting System* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 110-111 (1973), and Congress has deprived the audience of the expression about public affairs that the audience has a right to receive. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). This outright curtailment of expression is not mitigated by the continued rights of others besides the broadcaster to express their views over the air.[2] Indeed, as this Court has declared, "serious First Amendment issues" would be raised if a broadcaster is refused to permit "to carry a particular program or *to publish his own views*." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969) (emphasis added).

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[2]The broadcaster receiving federal funds may air the views of others, labeling those views as editorials and making rebuttal time available, consistent with the Fairness Doctrine, see 47 U.S.C. sec. 315(a), so long as the broadcaster assures that "the surrounding facts and circumstances of any such aired views do not indicate that such views are represented or intended as the official opinion of the licensee or its management." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1973).

Such serious First Amendment issues are raised by Section 399, despite the Government's effort to characterize this governmentally induced waiver of constitutionally protected speech merely a Congressional "determin[ation] that it will not subsidize editorializing." Brief for the United States, *FCC* v. *League of Women Voters of California*, at 42. Section 399 is not a refusal to subsidize noncommercial broadcaster editorializing; it is a refusal to permit it.[3]

Section 399 conditions federal funds not simply on restrictions as to their usage, but on the broadcaster's waiver of constitutionally protected expression, financed by other sources. Thus, Section 399 abrogates the rule that the government may not use its powers to grant or withhold benefits to infringe on fundamental freedoms. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958); *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593-594 (1926). Even where the government may deny a benefit, it may not do so because of an impermissible reason, such as a desire to suppress disfavored speech. See *Perry* v. *Sindermann*, 407 U.S. 593, 597 (1972). Nor may the government use its power to grant a benefit to deprive private parties of their constitutional rights. *Speiser* v. *Randall*, 357 U.S. 513, 518 (1948). And yet Section 399 seeks to deploy the federal grants process to deprive noncommercial broadcasters of their protected freedom to express views on public issues; the provision is not merely a governmental refusal to subsidize that expression.

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[3] The government is not entirely free to refuse to subsidize the exercise of private rights; where that refusal effectively denies those rights, constitutional protections may well arise. *Regan* v. *Taxation With Representation*, 51 U.S.L.W. 4583, 4587 (1983) (Blackmun, J. concurring) (Congress may decline to accord tax-exempt status for organization that lobbies but may not preclude alternate channels for that protected First Amendment activity).

Even for noncommercial broadcasters having associations with local or state governments — broadcasters like public universities, municipal authorities, or school boards — Section 399 amounts to a greater governmental denial that a mere refusal to subsidize broadcaster editorials. Instead, Section 399 prevents these broadcasters from editorializing with the use of nonfederal funds, once the broadcasters accept a federal grant from the Corporation for Public Broadcasting. Through Section 399, the federal government has leveraged its financial contribution to public broadcasting, however small a fraction of the broadcaster's budget, into control over that entire budget. Private monies and state and local monies alike are restricted from editorial use by the broadcaster receiving a federal grant. Private editorial speech and public — but nonfederal — editorial views alike are affirmatively denied airtime and denied to the audience. Section 399 is not merely a refusal by the government to remove obstacles "not of its own creation;" the provision "place[s] obstacles in the path" of broadcasters' freedom of speech. *Harris* v. *McRae*, 448 U.S. 297, 316 (1980). See also *Regan* v. *Taxation with Representation*, 51 U.S.L.W. 4583, 4586 (1983).

Only noncommercial broadcasters can be blocked by this obstacle. Commercial broadcasters retain the right to editorialize, as do editors of newspapers and magazines. Thus, noncommercial broadcasters as a group of speakers are selectively denied the right to address audiences on "public issues." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973). Such differential treatment of expressive media burdens the First Amendment. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'ner of Revenue*, 51 U.S.L.W. 4315, 4317-4318 (March 29, 1983) (in this respect, Section 399, as a regulation "curtail[ing] expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech, or of the

press.' A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation.'" *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 529, 2338 (1980) (Stevens, J., concurring).[4]

If the Congressional goal were simply to avoid subsidizing the editorial speech of broadcasters, far less intrusive means are available. Separate accounting for the federal and non-federal funds is already a technique routinely used to secure legitimate government purposes elsewhere, consistent with Constitutional guarantees. See infra at 31. Section 399 in contrast extends the thumb of governmental support onto the entire broadcast activities of public stations receiving a federal grant, and at minimum violates the constitutional prohibition against overbroad restrictions on fundamental freedoms.

B. *The Incursion on First Amendment Rights Cannot be Justified by the Government's Role in Public Broadcasting.*

The Government argues that the public nature of public broadcasting involves a commitment to a form of public broadcasting that justifies the Congressional ban on broadcaster editorializing. Brief for the United States, *FCC* v. *League of Women Voters of California*, No. 82-912, at 6-7, 9-22, 33-34. Thus, the government claims that public broadcasting is "the product of a national commitment, financed by government," Brief for the United States at 6, and the kind of public broadcasting the Government wants does not include

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[4] The differential treatment of noncommercial and commercial broadcasters in this regard also may present a violation of the guarantee of Equal Protection. See *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1945). See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

broadcaster editorials. This argument mistakes both the actual nature of the public broadcasting endorsed by Congress and the scope of Congressional power in this area.

First, the kind of public broadcasting endorsed by the Congress is nonfederal, decentralized, and directed by the expressive freedoms and creative judgments of private groups and local and state agencies. Congress sought to promote the educational and cultural uses of broadcasting, with maximum freedom from interference regarding program content. See 47 U.S.C. sec. 396(a)(7) (1970). Congress specifically rejected public broadcasting premised on federal management and ownership. Rather than producing a public broadcasting system to its own specifications, Congress approved decentralized control, with private and nonfederal ownership. *Public Broadcasting Act of 1967*, Pub.L. No. 92-129, 47 U.S.C. (& Supp. V) sec. 390 et seq. See also 47 U.S.C.A. sec. 396(k)(9)(B) (role of community advisory board).

Indeed, Congress so wanted to shield noncommercial public broadcasting from the demands of even a beneficient federal government that it created the nonprofit, government-chartered Corporation for Public Broadcasting to insulate stations from government pressure while channeling federal funds to those stations. 47 U.S.C. (& Supp. V) 396 (b-g). Declaring that diversity in programming depends on "freedom, imagination, and initiative," Congress directed the Corporation for Public Broadcasting to "afford maximum protection from extraneous interference and control." 47 U.S.C.A. sec. 396(a)(1), (3) (7) (West Supp. 1979). Entrusted with raising and disbursing funds and encouraging the creation of new noncommercial stations, the Corporation is itself prohibited from owning or operating a public telecommunications system, and from producing or distributing programs. 47 U.S.C.A. sec. 396(b), (c) (1), (g) (3) (West Supp. 1979). Most of the programming is to be developed by local stations. The conception

of public broadcasting adopted by Congress, then, is a conception of private and nonfederal initiative freed from the fetters of commercial pressures, and assisted by the federal government but shielded from its control.

Accordingly, Section 399 cannot be defended on the possibility that Congress could have created a federally owned and operated broadcasting network like Britain's BBC.[5] It is just this possibility that Congress rejected. Moreover, the particular conception of public broadcasting chosen by Congress preserved private and decentralized initiative and freedom, a conception incompatible with federal prescriptions about what kinds of expression can be aired.

Moreover, the Government's assumption that Congress may avoid First Amendment restrictions by asserting governmental involvement in the design and regulation of a broadcast system is patently refutable by the example of commercial broadcasting. There too Congress governs and supervises the allocation of the airwaves; there too the federal government grants and revokes licenses; there too the Government is inextricably involved with private broadcast activities; and indeed, there too the Government has provided enormous economic subsidy through its provision of valuable licenses for the exclusive use of the public air waves. See generally 47 U.S.C. sec. 301, 315(a)(FCC licensing and equal time rules). But the First Amendment remains a vital and powerful limit on what the federal government may regulate in the commercial broadcast setting, and the same must be true with public broadcasting. *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v.

[5] Nor is it clear that either a federally owned and operated broadcast network would survive First Amendment scrutiny. See *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 149-150 (1973) (Douglas, J., concurring) (even if Public Broadcasting were considered a governmental agency, First Amendment strictures would apply). Certainly this issue is not presented to the Court here.

FCC, 395 U.S. 367, 390 (1969); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Just as the regulatory necessity of scarcity cannot be used to silence private First Amendment rights of commercial broadcasters, governmental involvement in public broadcasting cannot be used to bypass First Amendment constraints. The degree of governmental involvement in public broadcasting can no more justify governmental censorship of public broadcaster views than governmental involvement in private broadcasting can justify censorship of private broadcaster views. Nor may governmental restriction on protected expression by private parties be upheld simply because of "the special interests of a government in overseeing the use of its property." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980).

C. *If Federal Grants Can Carry Strings Controlling the Use of Nonfederal Funds, as in Section 399, No First Amendment Freedoms Can Survive the Modern Regulatory Environment.*

If Section 399's prohibition of public broadcaster editorializing is Constitutional because of "[p]ublic broadcasting's entanglements with and dependence on government," Brief for the United States, at 18, there will be no limit to similar curtailments of fundamental freedoms in the modern social environment of private individuals' and organizations' entanglements and dependence on government.

It has been nearly twenty years since the classic Yale Law Journal article demonstrated the dependence of all Americans on varied forms of governmental support and benefits. *Reich, The New Property*, 73 Yale L. J. 733 (1964). Since that time, the pervasiveness of governmental involvement in productive activity and daily life has only increased, and the typical American's life is enmeshed with government services and assistance.

Just in the area of housing, Federal Mortgage Insurance, 12 U.S.C.A. sec. 1709, federal home improvements loans, 12 U.S.C.A. sec. 1715K, the Emergency Homeowners' Relief Fund, 12 U.S.C.A. sec. 2701 et seq., and the Urban Homesteading Program 12 U.S.C.A. sec. 1706e provide security and enable individuals and families to find and maintain their homes. Federal regulation of banks protects bank mortgages as well as individual savings. See 12 U.S.C.A. sec. 1811, et seq. Millions of people rely on each of these programs or depend on federal rent supplements for low-income families, 12 U.S.C.A. sec. 1701s, and federally-subsidized public housing, 12 U.S.C.A. sec. 1701x.

Similarly, health, nutrition, and personal income in this country now involve so much governmental support that no individual is independent of federal assistance of some kind. There are the well-known assistance programs, like Medicaid and Medicare, 42 U.S.C.A. sec. 1395, Food Stamps, 7 U.S.C.A. sec. 2011 et seq., Aid to Families with Dependent Children, 42 U.S.C.A. sec. 601 et seq.; School Lunch and School Breakfast Programs, 42 U.S.C.A. sec. 1751, et seq.; and Supplemental Social Security Income, 42 U.S.C.A. sec. 1382. But government entanglement in food and medical care is even more penetrating, given Federal regulation under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. sec. 301, et seq., federally-supported nutrition research, 7 U.S.C.A. sec. 361a-c; 427, 427i, tax subsidies for personal medical expenses, 26 U.S.C.A. sec. 104, 105, 213, and preventive health services programs, 42 U.S.C.A. sec. 247. Federal involvement in basic income supports span Social Security, 42 U.S.C.A. 301 et seq., government pensions, and federally regulated private pensions, under the Employee Retirement Income Security Act, 29 U.S.C.A. sec. 1001.

Federal regulation and assistance to private industry takes the form of tax subsidies, direct loans, and loan guarantees.

Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1984, 5-2 to 5-6, 6-16 to 6-20. The 1984 estimates of federal assistance for commerce and housing through the tax structure is $115.6 billion. *Id.* at 5-64. Many industries, like the oil industry, receive massive injections of government assistance, through such devices as the oil depletion allowance. See 26 U.S.C.A. sec. 613 (1982). The estimated value of this allowance to the oil industry in 1984 is $3.0 billion. Surely no effort has been made to curtail the speech of these commercial enterprises given the extent and entanglement of government support. Indeed, private commercial speech has been bolstered by Constitutional protection in recent years, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 756 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and both the press and broadcast forums regularly include expressions by such companies as Mobil and Xerox.

Another area inextricably entwining governmental support and private activities is communications. Federal regulation of telephone services has recently occupied the attention of federal courts and Congress as well as the Federal Communications Commission. See *United States* v. *AT & T, Western Electric Co., Inc., and Bell Telephone Laboratories, Inc.*, Civ. No. 74-1698 (D.D.C. dismissed by stipulation Jan. 8, 1982); *Tannenbaum and Hurst, The AT&T Agreement: Reorganization of the Telecommunications Industry and Conflicts with Illinois Law*, 15 John Marshall L. Rev. 463 (1982). Public mail service remains a central form for private communication, see 39 U.S.C.A. sec. 101 et seq. The Federal government licenses broadcast services, 47 U.S.C.A. sec. 301, 309, and coordinates communication systems. 47 U.S.C.A. sec. 11, 154(o).

Still another area enmeshed with governmental assistance is education. Federal grants to improve basic skills training in

local schools, 20 U.S.C.A. sec. 2722, federally insured student loans for college and university students, 20 U.S.C.A. sec. 1071, basic educational opportunity grants, 20 U.S.C.A. sec. 1070, and federal grant support and tax subsidies for colleges and universities are essential to the educational opportunities for individual students and centrally important to the continued existence of these institutions for learning.

According to the Government's reasoning in this case, the fact of government involvement in each of these areas could supply a basis for waiving First Amendment and other fundamental freedoms even where private funds are used to exercise those freedoms. The dependency of individuals, groups, and institutions on federal assistance cannot be denied; the deep involvement of the government in structuring and maintaining health, education, communication, and income services is obvious. If the sheer presence of federal support or subsidy can supply the basis for curtailing individual freedoms, even if other financial sources are available to enable their exercise, then there is no corner of contemporary society in which individual freedom can withstand assault.

Until now, the courts have held careful check on the degree to which government support may carry strings that paralyze constitutional freedoms. In the academic context, even where the government is the employer, the free speech of teachers retains constitutional protection. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The academic freedom of students also has remained protected even where the students depend upon government aid. *Haverford College* v. *Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1977) (striking state statute requiring college to report student violations of campus rules for purpose of withdrawing state scholarship aid).[6]

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[6] Here the academic freedom hypothetical in the Government's brief if anything supports appellees. The Government concedes that "The govern-

The mere fact of governmental support cannot supply a basis for controlling individual freedom; only weighty state interests, carefully pursued, may be used to justify intrusion on such freedoms. See *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). The federal government has generally heretofore hewed this line in establishing controls for federal grants that essentially protect the rights of grant recipients while assuring accountable use of the federal funds. Stephen M. Barro, Federal Education Goals and Policy Instruments, in *Symposium on The Federal Interest in Financing Schooling*, at 229 (M. Timpane ed. 1978).

Similarly, federal involvement in communications services has never justified federal control to the exclusion of private freedoms. *Red Lion* v. *FCC*, 395 U.S. 367, 390 (1969) ("the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment [which are] to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that

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ment could not prohibit outside research by a college professor who received a small grant to conduct research in a particular area because, assuming that he properly performed the research called for in the grant, the government would not be financing his other work any more than it would be financing his private life." Brief for the United States, at 46-47, n.77. Public broadcasters receiving federal grants through the Corporation for Public Broadcasting similarly have other nonfederal sources to finance editorials and other broadcasting purposes. The Government erroneously claims that "if the government gave [the college professor] access to a federally financed laboratory for the purpose of doing the grant research, it could legitimately insist that he not use the facility for printing political propaganda pamphlets." *Id.* This Court has held to the contrary that even where the entire academic environment is sustained by government support, a teacher may not be forced to waive his or her expressive freedoms, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

market, whether it be by the Government itself or a private licensee"); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 145, 156 (1946) (second-class mail permit may not be conditioned upon grounds curtailing expression).

To conclude instead, as the Government urges in this case, that federal involvement through financial subsidy and regulation can justify control over private activities even where nonfederal support is also present, would leave no institution or person able to enjoy fundamental freedoms. The presence of the federal government in income subsidies and taxation, health insurance and services, housing subsidies, communication, education, and a host of other areas is so pervasive that no activity could be immune from the kind of intrusion deployed in Section 399. This has not been the heritage of our Constitution, nor can it be its destiny.

II. Section 399's Censorship of Speech Lacks Substantial or Important Governmental Interests and Fails to Employ Available Less Restrictive Means.

Although the "unique and special problems" of broadcasting — the physical scarcity of broadcasting frequencies — have called for a different kind of Governmental involvement, and different First Amendment doctrine than other speech situations, *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969), governmental infringements of speech in the broadcast context still must survive Constitutional careful scrutiny. Debates over whether this scrutiny should be deemed to require "compelling governmental interests" or other par-

ticular doctrinal phrases misses the point:[7] the First Amendment in the broadcasting area stands "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Especially where the regulation restricts speech rather than promoting it, and where it singles out some speech for regulation, *Minneapolis Star & Tribune Co.* v. *Minn. Comm'ner of Revenue*, 103 S.Ct. 1365, 1370 (March 29, 1983), challenged governmental action must be justified by weighty interests and must be tailored to intrude no more than required to serve those interests. *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Neither of these requirements is even approximated here.

A. *The Government Has Failed to Demonstrate Weighty Interests Served by Section 399.*

The government's chief defense of Section 399 is that Congress does not want public broadcasters to editorialize. The

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[7] *Cf. Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971) (Burger, C.J.) (plurality opinion) ("There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutioinal adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired").

government simply asserts that the Congressional provision is necessary because the "public" nature of public broadcasting, as defined by Congress, could be interfered with by public broadcaster editorials. Brief for the United States, 33-35. As noted above, this claim of governmental interests depends on the fallacious argument that Congress can control public broadcasting because it is involved in its creation and maintenance. Surely an abridgement of the freedom of speech must be justified by more than a Congressional desire to control the nature of a major channel for expression and debate.

The government proffers two other interests to justify Section 399. First, it is supposed to protect the public from the use of taxpayer dollars or governmental support in the advancement of private "partisan" views, Brief for the United States, 34, 39, 42. Second, the provision is supposed to guard against undue government influence on the views expressed by broadcasters receiving or hoping to receive federal support.[8] No evidence of prior abuses is offered to support these assertions.[9]

Instead, the government has provided mere speculations of harm, which cannot satisfy the constitutional scrutiny accorded to impingements on fundamental freedom. *United Mine Workers* v. *Illinois Bar Assoc.*, 389 U.S. 217, 222-223 (1967). Just as in *Buckley* v. *Valeo*, 424 U.S. 1, 93 n.126 (1976), the

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[8] This asserted interest hardly justifies curtailment of noncommercial broadcaster editorializing on local issues, unrelated to federal support.

[9] Thus, Section 399 bears no resemblance to the Hatch Act provisions upheld in *U.S. Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973). Long experience with and detailed investigation into the political corruption of the spoils system in public employment justified the creation of the civil service system and the Hatch Act to curtail the risks that political activity by government employees would expose both those employees and the government to improper political influence. No such experience with abuses is offered in the public broadcasting context; nor is the public broadcaster a government employee.

claim that public funding could lead to governmental control and contamination of political freedom is "wholly speculative."

Moreover, these two interests offered by the government are mutually incompatible. On the one hand, the government warns of the magnification of private views, with broadcasters using the stations "to propagate their own partisan ends." Brief for the United States, at 34. On the other hand, the government warns of government orthodoxy and propagandizing through the voices of broadcasters seeking to curry favor with the Government funding sources. Brief for United States at 35. The risk that the broadcaster will become a mouthpiece for the government hardly seems weighty when coupled with a prediction that the broadcaster will express controversial, partisan views that are opposed by the majority of taxpayers and the government officials in power. As the Government acknowledges, the public affairs programming of public broadcasting has already demonstrated controversial and provocative qualities, Brief for the United States, at 41, and yet no charge is made that taxpayers' monies are misused in these programs, or that the audience attribute to the government the views expressed on these programs. Further, the alleged risk of political influence on broadcasting due to government funding surely is no greater in editorial expression than it is in programming generally, as the legislative history of Section 399 itself suggests.[10]

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[10] Thus, Representative Watson said "Let them go ahead and editorialize. Give me the right to control content and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing in the programs. The American public knows editorials are subjective, but they believe regular programs are objective." 113 Cong. Rec. 26392 (1967). The House Report, describing the ban on broadcaster editorializing, conceded that the result would not be balanced, fair, and objective presentations of controversial issues by noncommercial stations. H.R. Rep. No. 572, 90th Cong., 1st Sess. (Aug. 31, 1967), at 20.

Above all, the viewing and listening public is alerted best to the media's lack of objectivity when a broadcast is labeled an editorial, and prohibiting this portion of the broadcast day hardly eliminates whatever risks of government influence accompany government funding."

The Government's fear that taxpayer dollars may be used to advance "partisan" views apparently comes from a conception that public broadcasting, unlike other areas for public debate, should exclude partisan debate. The purpose of public broadcasting is, if anything, quite the opposite. As an alternative to commercial broadcasting, noncommercial educational broadcasting enlarges the range of options for listeners and viewers. Rather than purchasing controversial private views, the taxpayer dollars conveyed to the noncommercial broadcaster help pay for the forum for the expression of all views. In a very real sense, it is the general public, not the broadcaster, who is benefited by Governmental assistance to noncommercial broadcasting, and by the broadcaster's vital participation in the marketplace of ideas. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978). See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976). Similarly, the fear that governmental support for public broadcasting requires curtailing the broadcaster's own rights of expressions misunderstands the First Amendment's "central meaning" which "is to secure 'the widest possible dissemination of information from diverse and antagonistic forces.'" *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Assoc. Press, Inc.* v. *United States*, 326 U.S. 1, 20 (1945)). Points of view, efforts to persuade, partisan editorials are critical to the free expression protected by the First Amend-

ment; "'[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). See *First National Bank* v. *Bellotti*, 435 U.S. 765, 790 (1978). Unlike the Establishment Clause, which forbids the government not only from interfering with individual freedom of religion but also from favoring one religious view over any other, U.S. Const., Amend. I, government support of expression may be necessary to protect and preserve the freedoms of speech and of the press. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946). See also T. Emerson, *The System of Freedom of Expression* 627-630 (1970); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 642 (1982).

The interests asserted by the Government may betray not only serious misunderstanding of the First Amendment, but also an inappropriate Governmental desire to shut off a key source of independent criticism and controversy. Noncommercial broadcasting, as Congress intended, is freed from the pressures of advertising sponsors and profit-making, and thus offers a specially unfettered avenue for broadcast expression. In this light, the Government's repeated assertion that the views of broadcasters may be partisan and controversial not only falls short of the requisite weight for sustaining curtailment of speech; it demonstrates the very impetus behind the First Amendment in protecting from Government control the expression of dissenting and antagonistic views.[11]

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[11] Similarly, the Congressional supporters of Section 399 revealed fears of criticism that may well indicate why the First Amendment so centrally protects the kind of editorial speech banned by Section 399. Congressman Jeolson asserted that public officials were "sitting duck[s]" given media editorializing. 113 Cong. Rec. 26391 (1967). See generally Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31. 34 (1972) ("the purpose of Section 399 was clear: to prevent Con-

By seeking to silence "partisan" views on public issues, Section 399 offends the First Amendment's commitment to persuasive, political expression, and ignores this Court's declaration that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972). See *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 529 (1980); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

B. *The Government Has Failed to Use Readily Available, Less Restrictive Means to Achieve its Ends.*

Even if there were foundation for the Government's fears, there are measures less restrictive of free expression available to hold those fears in check. The audience could be protected from any confusion over whether editorials by noncommercial broadcasters are expressions of governmental views by a disclaimer to the contrary, accompanying each editorial, just as the permissible editorials carried by these stations currently disclaim identification with the broadcaster. The audience could similarly be guarded against any special advantage the broadcaster may have in access to the airwaves by effective enforcement of the Fairness Doctrine, 47 U.S.C. sec. 315(a) (1976), which requires the offer of air time to individuals personally attacked or editorially opposed by the station, 47 C.F.R. secs. 73.1910, 73.1920, 73.1930 (1982), and also requires adequate discussion of conflicting views on controversial subjects, 47 U.S.C. sec. 315(a) (1976).

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gress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech").

In addition, to guard against the use of taxpayers monies to finance the expression of "partisan" broadcaster views, Congress could require the broadcasters to segregate federal and nonfederal funds and provide separate accountings or assurances of separate uses for these funds. This technique is already effectively used to protect against governmental infringement of First Amendment freedoms, most notably in preserving freedom from Governmental establishment of religion. See *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

Each of these measures would accomplish the Governmental goals with less restrictions of freedom of expression than the flat curtailment of broadcaster editorializing embodied in Section 399. Effective use of safeguards already in place could also achieve the government's ends without banning broadcaster editorializing. In addition to the Fairness Doctrine, Congress has already structured the governance of public broadcasting to protect against both the risk of irresponsible uses of government funds and the risk of political influence on the expression by recipients of governmental grants. Congress established the Corporation for Public Broadcasting to insulate recipient broadcasters from government influence, 47 U.S.C. sec. 396(a)(1), (7) (West Supp. 1982); H.R. Rep. No. 572, 90th Cong., 1st Sess. 19-20 (1967), reprinted in [1967] U.S. Code Cong. & Ad. News 1799, 1810. Congress also guarded against even the appearance of Governmental orthodoxy as an influence in the grant process by requiring variety in political affiliations for the Board of Directors of the Corporation for Public Broadcasting: no more than eight of the fifteen directors may be members of the same political party, 47 U.S.C.A. sec. 396(c)(1) (West Supp. 1979). The Corporation's own practices require use of objective standards for awarding grants in order to avoid intruding

upon the content of broadcast expression. See 47 U.S.C. sec. 396(g)(1)(A). The Corporation has also established a semi-autonomous Program Fund to better insulate individual programming decisions from the directors. Broadcasting (June 25, 1979), at 54.

Finally, the best measure for curing fears of misleading or controversial speech is more speech and robust debate. "Falsehoods and fallacies must be exposed, not suppressed. . . . That is the command of the First Amendment." *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 396 (1950). See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770 (1976) (choice between "the dangers of suppressing information and the dangers of its misuse if it is freely available [is a choice] that the First Amendment makes for us"). The solution to the fear of governmental influence on the broadcaster editorials is to ensure greater access for alternative points of view; similarly an answer to fears of excessive editorial power by broadcasters would be increased opportunities of access for other speakers. Increased access to airtime on public broadcasting, thus, would be a method to meet the asserted governmental interests behind Section 399 consistent with the First Amendment.[12]

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[12] "The ultimate danger is not that the government's point of view gets across; it is that the views of others do not, and 'the remedy of silence is not the way of the first amendment.'" Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1127 (1974) (quoting Van Alstyne, *The First Amendment and the Suppression of Warmongering Propoganda in the United States*, 31 Law & Contemp. Prob. 530, 535 (1966).

Conclusion.

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted,

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